IN THE

Supreme Court of the United States

October Term 1955.

No. 342

BLAZEY CZAPLICKI, *Petitioner,*

against

The S/S HOEGH SILVERCLOUD, her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of THE NORWEGIAN SHIPPING & TRADE MISSION, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC., *Respondents.*

BRIEF ON THE MERITS OF RESPONDENTS', S/S HOEGH SILVERCLOUD, OIVIND LORENTZEN, ETC., AND KERR STEAMSHIP COMPANY, INC.

JAMES M. ESTABROOK,
Counsel for Respondents
s/s Hoegh Silvercloud,
Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and Kerr Steamship Company, Inc.

FRANCIS X. BYRN,
on the brief.

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Respondents.

BRIEF ON THE MERITS OF RESPONDENTS', S/S HOEGH SILVERCLOUD, OIVIND LORENTZEN, ETC., AND KERR STEAMSHIP COMPANY, INC.

Jurisdiction

Respondents herein question the jurisdiction of this Court on the following grounds:

1. In so far as the petitioner purports to attack a compensation award made September 28, 1945, by Louis G.

Schwartz, Deputy Commissioner of the Second Compensation District of the United States Employees' Compensation Commission (Lib. Ex. 2; R. 5, 23, 67), this Court has no power of review because of the specific and exclusive provisions for review found in Title 33, U. S. C., Sec. 921, subdivisions (a), (b) and (d).

2. If the petitioner does not purport to attack the award of September 28, 1945, then petitioner has no standing in this Court because, under Title 33, U. S. C., Sec. 933(b), any cause of action petitioner might have had for personal injuries against respondents was assigned to his employer as of September 28, 1945, and, consequently, petitioner is legally disabled from bringing this present action and there is no controversy between the parties before the Court.

3. Petitioner seeks relief against his employer, Northern Dock Company, and/or his employer's underwriter, The Travelers Insurance Company, to impose a trust upon them or to compel them to reassign the cause of action to him.

There is no jurisdiction of the person of either the Northern Dock Company or The Travelers Insurance Company, as they are not parties to the suit.

Statutes Involved

In addition to the statutes cited by petitioner, respondents herein cite the following:

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, Chapter 509, 44 Statutes at Large 1424.

Section 21 (a), (b) and (d) (33 U. S. Code 921).

a. "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 of this chapter, and, unless proceedings for the suspension or setting aside of such

order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

b. "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

c. "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18 of this chapter."

Section 22 (33 U. S. Code 922).

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with

the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary."

Section 33 (a), (d), (h) and (i) (33 U. S. Code 933).

a. "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

d. "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding."

h. "The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election."

i. "Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

Questions Presented

Jurisdictional Questions

1. (a) Whether this Court has jurisdiction to review a compensation order or award where the exclusive statutory provisions for review as to time, venue and party to be sued have not been followed?

(b) Whether this Court has any jurisdiction to make any determination with respect to issues which are moot as between the parties to this action inasmuch as the cause of action, by reason of the compensation order, does not belong to petitioner but has been assigned to his employer?

(c) Whether this Court has jurisdiction to afford petitioner relief as against persons not parties to this action?

2. Assuming but not conceding that the validity of the award may be reviewed at this time, whether or not on the merits of the proceedings before the Deputy Commissioner a valid award was not made?

3. Whether or not petitioner made a binding election to accept compensation, thereby precluding any right to a third-party suit either directly under the award or indirectly by compelling the assignee to sue?

4. Whether in the absence of fraud or any conduct on the part of the Deputy Commissioner, the employer or the underwriter, not in keeping with the provisions of the Act or the decided cases, a trust relationship may be imposed by the Court where the statute does not provide for any such relief, and whether, even assuming such a trust relationship, this Court may give any such relief absent a showing of wrongdoing by the trustee?

5. Whether petitioner is barred by laches or whether the issue of laches is not moot as to the timeliness of this action for personal injuries because of the legal effect of the award in assigning the cause of action?

Statement

The petitioner, a longshoreman, filed a libel in admiralty on June 12, 1952, to recover damages for personal injuries allegedly sustained on September 6, 1945, while working aboard the s/s Hoegh Silvercloud, at Pier 3, Hoboken, New Jersey. His employer was Northern Dock Company. It is claimed that the petitioner fell down a catwalk on the deck of the s/s Hoegh Silvercloud, which was erected by respondent Hamilton Marine Contracting Company, Inc. At the time of the accident the vessel was owned by Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission. The above was an official organ of the Royal Norwegian Government.

Kerr Steamship Company, Inc., acted as agents for the vessel at that time.

Hamilton Marine Contracting Company, Inc., was engaged to do carpenter work aboard the vessel.

Following the accident, petitioner's employer, Northern Dock Company, filed a report of accident at the Compensation Commission, dated September 6, 1945 (Lib. Ex. 3; R. 5, 70A).

On September 17, 1945, it would appear (petitioner's brief p. 10) that petitioner went from his home in Jersey City, New Jersey, to the insurance company office in Newark, New Jersey, and was undecided as to whether or not to take compensation or to sue a third party.

On that same day The Travelers Insurance Company, the compensation carrier for petitioner's employer, sent a notice to the Commission, dated September 17, 1945, that the claim of the petitioner would be controverted (Lib. Ex. 4; R. 5, 71).

On September 25, 1945, Claims Examiner O'Keefe, for the Compensation Commission, addressed a letter to petitioner advising him that payments were being held up pending an election to take compensation or commence a third-party suit (Opinion Judge Sugarman, R. 33). (Note: This letter was designated by respondents herein to appear as part of the record, but unfortunately was not included. It appears instead at page 1a of an appendix to this brief.)

According to respondent Hamilton's Exhibit A (R. 4, 74), which was a memorandum prepared by Mr. D. B. O'Keefe, petitioner called at the Commission in New York on September 27, 1945, and the provisions of Section 33(b) of the Longshoremen's Act were explained to him. According to the memorandum, petitioner stated definitely that he desired to receive his compensation and to waive any rights to the third-party action, and that he did not desire to consult an attorney in the matter. The memorandum further said that the petitioner filed a claim for compensation and a formal order would be issued accordingly.

Libelant's Exhibit 1, dated September 27, 1945 (R. 3, 66A), shows that a claim for compensation was indeed filed by the petitioner.

Libelant's Exhibit 2 (R. 5, 67) is the compensation award issued on September 28, 1945, by Deputy Commissioner Louis G. Schwartz. Said exhibit also shows that the award was sent by registered mail to all parties on September 28, 1945. The award provided that the petitioner receive compensation for two weeks at $22.50 per week for temporary total disability from September 14, 1945 to September 27, 1945, and thereafter until disability ceased.

Under the award, petitioner received compensation for seven weeks and one day, or a total of $160.72. On December 5, 1945, Claims Examiner O'Keefe again wrote petitioner advising him that compensation would cease because

petitioner had no further disability from work (Lib. Ex. 6; R. 6, 73).

No effort was made under Section 921 of Title 33, U. S. C. to obtain a review of the compensation order containing the award, and no effort was made by petitioner, based on any change of condition or mistake, to obtain a modification of the award within one year from the date of the last payment of compensation, as provided in Section 922 of Title 33.

Suit was commenced by the filing of the libel against the named respondents herein on June 12, 1952. Service was effected against Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, by service of process on Mr. Tancred Ibsen, Vice Consul of the Royal Norwegian Consulate in New York.

On July 29, 1952, exceptions and exceptive allegations were filed on behalf of Kerr Steamship Company, Inc., on the grounds of (1) petitioner's laches, and (2) because he had received a formal compensation award and was an improper party to bring suit, the case having been assigned to his employer by Section 933(b) of Title 33, U. S. C. (R. 20, 21). It was also urged before the Court that the formal compensation award of September 28, 1945, was final in so far as judicial review was possible, since more than thirty days had elapsed since its filing, citing 33 U. S. C. Sec. 921 (a), (b) and (d). After hearing argument on the exceptions, Judge Sugarman handed down a memorandum opinion (R. 33) sustaining the exceptions, based on the formal award.

By notice of motion (R. 38) dated October 30, 1953, petitioner for the first time sought relief against The Travelers Insurance Company either to add it as a party or to compel said company to assign the cause of action back to petitioner. In the opinion filed by Judge Henry

Goddard November 30, 1953, the motion was denied in all respects (R. 42).

Subsequently, it was agreed that all parties would appear before the Court for hearing as to whether or not the case should be dismissed as to The Norwegian Shipping & Trade Mission and Hamilton Marine Contracting Company, Inc., on the same grounds that it was dismissed as to Kerr Steamship Company, Inc., by Judge Sugarman, to wit, that there had been an award and an assignment of the petitioner's claim to his employer. After a hearing, Judge Sylvester J. Ryan followed the decision of Judge Sugarman of December 11, 1952, and dismissed the libel as to the two remaining parties May 10, 1954 (R. 11, 52).

There is no claim that either The Norwegian Shipping & Trade Mission or Kerr Steamship Company, Inc., were in any way associated with the Northern Dock Company, The Travelers Insurance Company or Hamilton Marine Contracting Company, Inc.

Summary of Argument

Respondents herein believe that a more orderly presentation of the argument would discuss first the assailability of the award; second, the validity of the award, and third the legal effect thereof, before any consideration can be given to a trustee relationship between petitioner and the Travelers Insurance Company and also the question of laches. These questions are jurisdictional and if there is no jurisdiction the rest of the argument is moot.

An award may be reviewed only under the specific and exclusive provisions of Section 921 (a), (b) and (d) of Title 33, U. S. C. Petitioner has attacked the award both directly in his brief and collaterally by the very bringing of this suit.

If petitioner is legally disabled from attacking the award, is not attacking the award, or the award is valid on its own merits operating to assign the cause of action to petitioner's employer, then there is no cause of action by petitioner Blazey Czaplicki against any of the respondents herein and therefore no controversy between any of the parties into this suit. Any further relief that petitioner seeks must come in another proceeding.

Petitioner has made a binding election to accept compensation in this suit in accordance with the provisions of Title 33, U. S. C., 933(a). The election was made under a formal award (Title 33, U. S. C. 933(b)) and petitioner has waived any right to a third party action either in his own right or in the name of a trustee.

It is only when we assume that the award is a valid one that petitioner's point as to the Travelers Insurance Company and/or Northern Dock Company being trustees comes into play. If the award be invalid, then there was no assignment and the petitioner himself could bring suit subject only to the question of laches. It can be seen readily, therefore, that the petitioner himself must assume in his first point in his brief that the award is a valid one operating as an assignment.

The Longshoremen's Act does not compel an assignee under an award to sue a possible third party. The assignee may sue or compromise or not claim at all. Everything that took place before the Deputy Commissioner in this suit was within the provisions of the Act. Petitioner's criticism is of the Act itself. A bill (H. R. 10119—March 21, 1956) has been introduced seeking to change the effect of an award. Fraud has been specifically disavowed by petitioner. Under the authority of *Hunt* v. *Bank Line, Ltd.*, 35

F. 2d 136, the assignee has complete control of the disposition of the case following assignment. Even assuming that the employer and carrier be deemed trustees in a situation where a potential third party is covered by the same underwriter as a claimant's employer, it is not enough to deem this a trustee relationship, but there must be shown some breach thereof on the part of the trustee. Identity of underwriters does not of itself show any breach of the relationship so as to compel the trustee to sue the named third parties herein in behalf of petitioner. The trustee might have acted in good faith and in petitioner's best interests in not commencing suit. In any event, this Court does not have the power to either impose a trust on the Northern Dock Company or the Travelers Insurance Company or to hold that these parties have been guilty of a breach of trust inasmuch as they are not parties to this lawsuit. Any such relationship must be established under a separate proceeding brought for that purpose.

Given an award with a consequent assignment of the cause of action to petitioner's employer, petitioner could not, of course, be guilty of laches in commencing this suit, for it was not his to begin with. Petitioner was guilty of laches in not moving under Section 921 of Title 33, U. S. C., to set aside the award, or moving under Section 922 of Title 33, U. S. C., to modify the award if dissatisfied with the payments of compensation.

The Royal Norwegian Government having continuously maintained the consulate on which service was effected, no statutes of limitation have been tolled.

ARGUMENT

POINT I

Petitioner did not comply with the specific and exclusive provisions for review in Section 921 of Title 33, U. S. C., and therefore this Court has no jurisdiction to review the compensation award of September 28, 1945.

On page 35 of his brief on the merits petitioner states that he does not attack the proceedings in the Commission directly or collaterally. He does, at the same time, deny the legal effect of the compensation award of September 28, 1945, assigning the cause of action to his employer. Petitioner claims that it did not meet the procedural requirements of Section 919. This is, of course, a direct attack on the award. Petitioner collaterally attacks the award by the very bringing of this action for personal injuries, which must assume (1) there is no assignment and therefore (2) the invalidity of the award of September 28, 1945.

Section 921 (a) and (b) of Title 33 are specific as to the procedure to be followed for review of a compensation order. Suit is to be commenced in the District Court in the district where the accident occurred (New Jersey, not New York), within thirty days after the filing of the compensation order, and shall be brought against the Deputy Commissioner. None of these requisites have been followed.

Section 921(d) expressly provides that this is the exclusive method of review.

In *Crowell* v. *Benson*, 285 U. S. 22 (1932), this Court said, p. 63:

> "* * * The remedy which the statute makes available is not by an appeal or by a writ of certiorari for

> a review of his determination upon the record before him (the deputy commissioner). The remedy is 'through injunction proceedings, mandatory or otherwise.' § 21(b)."

The statute has been strictly construed.

In *Parker* v. *Motorboat Sales, Inc.*, 314 U. S. 244 (1941), at pp. 250-251, this Court held that in the instance of an improper party claimant the award of the Deputy Commissioner would be immune from an attack where the period for review had elapsed. In that case the facts showed that the deceased employee did not have a legal representative, the claim being filed by his widow. The statute provided that the legal representative was to bring suit or file claim. This Court said, p. 251, as to the contention of the respondent that the award was void:

> "Since the respondent did not contest the widow's capacity to file a claim, either before the Deputy Commissioner or in the District Court, the objection, even if otherwise meritorious, was made too late. Cf. *McCandless* v. *Furland*, 293 U. S. 67."

The United States Courts of Appeals and their predecessor courts have also construed Section 921 strictly.

In *Associated Indemnity Corporation* v. *Marshall*, 71 F. 2d 235 (1934), the Ninth Circuit, discussing Section 921(b) as a form of appeal, said at p. 236:

> "* * * Although in form not an appeal, a proceeding to set aside the award is somewhat analogous to an appeal; * * *. * * * Appellants argue, however, that since these proceedings are in equity, and are not attacks on decrees or judgments of a court, the chancellor exercising the flexible powers of equity should do full and not partial justice. But the remedial powers of the court are only those which are conferred by the statute and are strictly confined to the suspension or setting aside of the order."

In *Swofford* v. *International Mercantile Marine Company*, 113 F. 2d 179 (1940), the Court of Appeals for the District of Columbia found that the 30-day period had expired before application for review was made and that (p. 182):

> "It is well settled that when the time for appeal has expired, a judgment entered by a tribunal with jurisdiction is binding even though erroneous."

The Court then cited Section 921(d), and commented on it by saying (pp. 182-183):

> "By this provision we think Congress has clearly precluded collateral attack on an order of the Deputy Commissioner, at least where the latter had jurisdiction over the claim for compensation, over the parties, and where the review provided by § 21(b) would have embraced the issues involved. Having failed to avail itself of its statutory remedy the company is without any."

The company then claimed the constitutional right to "attack collaterally" an order of the Deputy Commissioner. The Court said of the right to a hearing and the right to review (p. 183):

> "* * * Where, as here, those safeguards are made available to the employer, the contention that there is a constitutional right to attack the Deputy Commissioner's order collaterally is without foundation. Due process of law is not so arbitrary."

A failure to proceed according to the statute in any particular is a jurisdictional defect in any other proceeding attacking the award directly or collaterally. Thus, in *Hagens* v. *United Fruit Co.*, 135 F. 2d 842 (C. C. A. 2, 1943), the plaintiff, as here, assuming the invalidity of the award, commenced an action for personal injuries. The defendant's motion to dismiss was upheld on the grounds that the award was being collaterally attacked and that plaintiff should have proceeded against the Deputy Commissioner.

In *Bassett* v. *Massman Construction Co.*, 120 F. 2d 230 (1941) (8th Cir.), Cert. Den. 314 U. S. 648, it was held that the action against the Deputy Commissioner could only be brought in the District where the award was made, and other District Courts had no jurisdiction.

Failure to proceed within the 30-day time limit is also a fatal jurisdictional defect.

In *Mille* v. *McManigal*, 69 F. 2d 644; 645 (1934) (2d Cir.), the claimant sought a petition for mandamus to compel the Deputy Commissioner to hear an application to increase an award. At the time of the award, the petitioner's injuries were thought to be slight, but later they turned out to be more serious than anticipated. After the lapse of more than two years from the granting of the award, the plaintiff made an application under Section 922 to have the award increased, which the Deputy Commissioner denied. The District Court dismissed the petition and, on appeal, the Second Circuit, after stating it had no jurisdiction of a petition for mandamus, went on to say, page 645:

> "* * * If it be treated as a bill in equity for a 'mandatory' injunction under section 921 of title 33 USCA, then it was not filed in season. Section 921(a) provides that a 'compensation order' becomes 'final' at the end of thirty days after it is filed unless proceedings under section 921(b) have been begun meanwhile. We said in Twine v. Locke (Jan. 8, 1934), 68 F. (2d) 712, that this involved as a corollary that any suit under section 921(b) must be begun within thirty days after the compensation order was filed, from which it was indeed no more than a kind of appeal. Here the deputy commissioner's order was filed on May 5, 1933, and the rule nisi for the writ was taken out on June 26, 1933, more than thirty days thereafter. If this be a bill in equity under section 921(b), it was therefore too late. The District Court had no jurisdiction and should have dismissed the petition for that reason."

The Court of Appeals for the Second Circuit in its opinion in the case at bar (R. 56, 59) said:

> "Libelant contends, in the alternative, that no legitimate award of compensation was ever made because of alleged procedural defects in the compensation proceeding. But the statute allows direct judicial review of an award, 33 U. S. C. Sec. 921, and that section provides the exclusive method of securing judicial relief."

POINT II

Assuming but not conceding that petitioner may challenge the award of September 28, 1945, it is clear that the proceedings before and the award of the Deputy Commissioner were in all respects in accordance with the provisions of the Act.

In his brief on the merits, petitioner in Point III voices three criticisms of the procedure before the Deputy Commissioner as grounds for denying legal effect to the award. It is claimed that there was no hearing; that no 20-day period had elapsed from the date notice had been given to the employer of a claim being filed before an award was made; and the point is also raised that the award does not have an element of "finality". In substance, therefore, it is petitioner's contention that, because of a failure to satisfy procedural requirements, the order entered by the Deputy Commissioner did not operate as an assignment of the cause of action to his employer under Section 933(b) of Title 33, although admitting that he is not attacking the proceedings of the Compensation Commission, directly or collaterally (p. 35, petitioner's brief). These positions are, of course, inconsistent, but it may, nevertheless, be profitable to examine the proceedings before the Deputy Commissioner to test petitioner's claim of impropriety.

The procedural requirements for an award are set forth in Section 919 of Title 33 USC. A perusal of the exhibits herein shows that said requirements have been fully complied with:

1. Claim was filed as required under Section 919(a) (Libelant's Exhibit 1, R. 66A).

2. It was not necessary to notify claimant that a claim had been filed (Sec. 919(b)); and as to the employer and carrier, sufficient notice may be presumed (Sec. 920(b)). Indeed, the employer knew of the injury because it reported it to the Compensation Commission (Libelant's Exhibit 3, R. 70A). The carrier received notice of the injury from the employer on September 11, 1945, as appears from Libelant's Exhibit 4, item 7 (R. 71). The carrier was aware of the claim filed with the Compensation Commission, because it controverted the same (Libelant's Exhibit 4, R. 71).

3. The Deputy Commissioner made an express finding of fact that he investigated the case, as required under Section 919(c) (Libelant's Exhibit 2, R. 67).

4. The Deputy Commissioner stated in the award that no interested party applied for a hearing; it was therefore waived by all. The Deputy Commissioner also stated that no hearing was necessary. Under Section 919(c), the Deputy Commissioner shall make such investigation as he considers necessary and, upon application of any interested party, shall order a hearing. Since no application was made, no hearing was necessary.

5. Under Section 919(e), the order rejecting the claim or making the award is to be filed in the office of the Deputy Commissioner, and a copy sent by registered mail to the claimant and to the employer. Under Libelant's Exhibit 2, R. 67; at 69, D. B. O'Keefe, the Claims Examiner, certifies that he mailed a copy of the award to the claimant.

the employer and the underwriter. Claims Examiner O'Keefe certified that a "Compensation Order" was sent by registered mail. The document known as Libelant's Exhibit 2, R. 67, has for its description the very words employed in Section 919(e), that is,

"Compensation Order
Award of Compensation."

Concededly, under Section 919(c), the Deputy Commissioner did not wait 20 days after notice of claim was given to make the formal award. However, neither the employer nor the carrier has ever contested this irregularity. After claim is filed a hearing is primarily for their benefit to contest the claim that has been made. Here, the libelant obtained the more favorable of two possible results: his claim was not rejected; he did receive an award. A similar irregularity with respect to the 20-day period referred to in Section 919(c) has been held to be unimportant under a limitation that is "directory not mandatory or jurisdictional". *Maryland Casualty Co.* v. *Cardillo*, 99 F. (2d), 432 (Court of Appeals, Dist. of Columbia, 1938).

In *Candado Stevedoring Corp.* v. *Willard*, 185 F. 2d 232, 1950, the Court of Appeals for the Second Circuit said:

"* * * The 20-day provision in the last sentence of Sec. 19(c) we regard as neither mandatory nor jurisdictional."

The Court of Appeals in the case at bar (R. 56, 59) in its unanimous opinion said:

"* * * Even assuming, however, that an award may be thus collaterally attacked, libelant's allegation of error is without merit. He alleges that the deputy commissioner did not literally comply with the procedural requirement that he either hold a hearing on the claim or make an award without a hearing after 20 days had expired from service on the employer of notice of the claim (33 USC 919). In the instant case, there was no hearing nor was a hearing requested.

> Admittedly, the Deputy Commissioner did not wait until 20 days had expired after notice to the employer. But that requirement is solely for the benefit of the employer by allowing him sufficient time to prepare a defense, if any, to the claim."

The reason for the speedy action on the part of the Deputy Commissioner is obvious. The carrier filed a notice with the Deputy Commissioner that the claim would be controverted. This meant that the compensation need not be paid by the carrier (Sec. 914(a)). The Deputy Commissioner acted expeditiously in petitioner's interest to afford him the compensation he requested.

In *Norton* v. *Warner Co.*, 321 U.S. 565, 568, 569, this Court discussed the legislative policy behind prompt processing of claims to awards.

> "The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it. By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged."

Petitioner objects to the award as lacking "finality". This argument overlooks the fact that the findings of fact by the Deputy Commissioner contained in the award (R. 67) disposed of all issues in the case, except for the duration of a compensation. This, of course, could only be based on the length of petitioner's disability. Under petitioner's reasoning, the Deputy Commissioner, lacking clairvoyance, could never make an award until such time as disability ceased. That being so, the carrier could withhold compensation from the time it controverted the claim until an award was made (33 U.S.C. 914a). There is no authority in the Longshoremen's Act or in any practical administration thereof for any such practice. There is nothing more for the Deputy Commissioner to do, once he has es-

tablished the jurisdiction of the parties, the subject matter, the rate of compensation due the claimant, who shall pay the compensation and at what intervals. The rest is up to the doctors who periodically evaluate claimant's condition.

A distinction is attempted to be drawn in petitioner's brief between an award and an order, to wit, that this is not an award but merely an order. Actually, the language of Section 933(b) is the language of "compensation order", that is an award in a "compensation order". Section 919(e) refers to "the order rejecting the claim or making the award". Consequently, the distinction between an award and an order avails petitioner nothing because the Act refers to the document as a "compensation order".

Under Section 919(c), the Deputy Commissioner may do only two things when a claim has been filed. He may reject the claim or make an award in respect of the claim. Obviously, the Deputy Commissioner intended to make an award, and to all appearances did make an award. Petitioner's contention that it should be given less than its legal effect is unsupportable.

Petitioner cites *American Mutual Liability Ins.* v. *Lowe*, 13 F. Supp. 906, in support of his contention that there was no award. To understand clearly the holding in that case, it is necessary to read the opinion of the Court of Appeals for the Third Circuit, 85 F. 2d 625. Such opinion discloses that the Deputy Commissioner himself did not intend an award; that the so-called award was not signed; not served by registered mail; and was held in effect to be a "memorandum for file", which contained suggestions as to the disposition of the claim. The Court said at page 627:

> "The Deputy Commissioner used in his memorandum words of suggestion rather than of order."

Since there was no order or award, no 30-day period ran under Section 21, within which to attack it, and the Court of Appeals held that the lower Court had jurisdiction over

the case. None of the defects exist in the case at bar and the two cases are patently distinguishable.

It is readily apparent that the activities of the Deputy Commissioner in making this award in compensation order comported in all respects with procedural due process; that even if the petitioner may attack the award in the way he has, his criticisms are without merit. The petitioner was apparently disappointed in not receiving more compensation than he did, but, if he wished to attack the award, the remedy was open to him under Section 921(b); and if he wished the award modified because of a change in condition, it could have been done pursuant to Section 922 within one year after the date of the last payment of compensation. He did not undertake to follow either procedure.

POINT III

Given a valid award, petitioner's cause of action was assigned to his employer, and therefore there is no controversy between the parties to this action.

Should this Court hold, as did both the District Court, in the opinion of Judge Sugarman, and the Court of Appeals, in the opinion of Judge Frank, that there was an award and a consequent assignment of the cause of action to petitioner's employer, then there can be no cause of action by Blazey Czaplicki for personal injuries against all the respondents herein.

Since September 28, 1945, therefore, the within action for personal injuries has belonged to either Northern Dock Company or the Travelers Insurance Company by subrogation under Title 33 U. S. C. 933(I). When petitioner sued the vessel and the three respondents herein on June 12, 1952, he was legally disabled from doing so and, despite

all the activity in the case since that date, he is still so disabled.

Petitioner has usurped this assigned cause of action and employed it as a vehicle in the District Court, the Court of Appeals and in this Court to press his point that because of the identity of underwriters a trust relation exists between the Travelers Insurance Company and himself. Whatever merit there may be in such a contention should be asserted in another proceeding.

POINT IV

Petitioner has made a binding election to accept compensation and has thereby waived his right to sue a third party.

On September 17, 1945, petitioner was, according to his brief (page 10) at the office of the Travelers Insurance Company. At that time he was undecided whether or not to sue a third party.

On the same date the Travelers Insurance Company prepared a notice to the Deputy Commissioner that the claim would be controverted (Libelant's Exhibit 4, R. 71). Thereafter Claims Examiner O'Keefe of the Compensation Commission wrote a letter to petitioner explaining the alternatives open to him (Appendix to this brief, page 1a).

On September 27, 1945, petitioner appeared at the Compensation Office in response to the letter and discussed the election with Claims Examiner O'Keefe (Respondent Hamilton's Exhibit A, R. 74). According to Claims Examiner O'Keefe's memorandum:

> "He stated very definitely that he desired to receive his compensation, and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

> He filed a claim for compensation and a formal order will be issued accordingly."

Bearing out Claims Examiner O'Keefe's statement that a claim was filed, we have such a claim under date of September 27, 1945, signed by claimant and appearing as Libelant's Exhibit 1, R. 66A. The following day the formal compensation award was issued by Deputy Commissioner Louis G. Schwartz (Libelant's Exhibit 2, R. 67).

Thus, if everything Claims Examiner O'Keefe has said were true, then petitioner in 1945 elected to accept compensation in lieu of commencing a third-party suit as provided in Section 933, subdivision (a) of Title 33. His election was formalized in the award as provided in Section 933, subdivision (b) of Title 33.

Petitioner has denied that his rights were explained to him and that he did not understand what Claims Examiner O'Keefe said to him (R. 25).

With respect to this conflict District Judge Sugarman, in his opinion (R. 33) dismissing the libel as against Kerr Steamship Co., Inc., said (R. 35):

> "Libelant did more than fail to request a hearing. He called at the Commission, specifically waived his rights to sue a third party, elected to take compensation and declined to consult an attorney. In the face of O'Keefe's categorical statement of what transpired on September 27, 1945, docketed in the Commission's file the next day, I cannot accept the libelant's statement (in his answering affidavit of October 28, 1952) more than seven years later that he did not understand what O'Keefe told him as a basis for upsetting the finality of the Deputy Commissioner's award."

Under Section 933(a) of Title 33, U. S. C., a claimant may "elect by giving notice to the Deputy Commissioner in such manner as the Secretary may provide, to receive

such compensation or to recover damages against such third person."

In *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 454, petitioner argued that although (since the amendment to Section 33(b) of the Longshoremen's Act of 1938) mere acceptance of compensation did not operate as an assignment to the employer of the injured employee's cause of action against the third party tort feasor, said acceptance still operated as a conclusive election not to sue. This Court disagreed and said (p. 455):

> "* * * It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by Section 33(a) of the Act, which provides for notice of intention to the Deputy Commissioner, so the argument is technically imperfect. But, in any event, election not to sue a third party in assignment of a cause of action are two sides of the same coin."

Implicit in this decision is the holding that for an election to be effective it can only be accomplished in an award, assigning the cause of action as occurred in the present case.

A decision to accept compensation is not necessarily a bad one. Indeed so far is the Deputy Commissioner invested with discretion and authority that if petitioner were a minor, the Deputy Commissioner might make the election for him.

Petitioner, having consciously elected to accept compensation and waive a third party suit according to the exhibits and Claims Examiner O'Keefe, and there being no claim of fraud or duress, petitioner should not be heard to criticize his employer, Northern Dock Company, and/or the employer's underwriter, the Travelers Insurance Company, for not suing on the assigned cause of action.

POINT V

The Longshoremen's Act specifies no trust relationship between a claimant and the assignee under an award with respect to the decision to sue a third party.

If such a relationship does exist, there is no proof that there was any breach thereof in this case and any such breach must be determined in a separate proceeding against the party alleged to be trustee.

Petitioner apparently does not urge that a trust relationship between assignee under an award and a compensation claimant springs up in every case. It is petitioner's point that because the underwriter for Northern Dock Company, the Travelers Insurance Company, was the same as for the third party, Hamilton Marine Contracting Co., Inc., such special circumstances give rise to the trust relationship. Section 933 of Title 33 provides in section (d):

> "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding."

There is no language in the section compelling the institution of such a third party proceeding. However if the assignee compromises the claim or recovers in a suit brought against a third party, the assignee becomes a trustee to the extent of the amount of the recovery over the amount it is entitled to retain (33 U. S. C. 933(e)).

Petitioner asks this Court to recognize a trust relationship because of the alleged interest of the Travelers Insurance Company in not having Hamilton Marine Contracting Co. sued. Petitioner's point is not that there has been any wrongdoing in this case or any fraud practiced on petitioner, but that the situation lends itself to petitioner being put to a decision between compensation and suit when his judgment may be bent toward expediency. This criticism,

if valid, is not of any procedure in this case, but of the Act itself.

Petitioner is here trying to amend the Act by judicial, not legislative process. In fact there is a bill already introduced, H. R. 10,119, introduced March 21, 1956, that would permit third party actions to be brought despite the issuance of a formal award, and also would prohibit an employer from controverting liability on the grounds a third party is liable (Appendix to this brief, page 2a).

With respect to fraud District Judge Goddard, in his opinion rejecting the trust theory on the authority of *Hunt* v. *Bank Line*, 35 F. (2d) 136, said (R. 46):

> "Were there a showing of fraud, the result might be different. * * * the libelant does not charge fraud."

At the hearing before District Judge Ryan below, the following colloquy ensued (R. 6):

> "The Court: Has the libelant any proof of any fraud that it desires to submit to the Court?
>
> Mr. Terhune: I object to such proof——
>
> The Court: I just want to inquire and then I will hear your objection if an offer is made.
>
> Mr. Baker: We have no such evidence at this time, your Honor."

Apart from fraud, there was no conduct on the part of the employer, the insurance carrier or the Deputy Commissioner which was not sanctioned by the act or by the opinion of this Court in *American Stevedores* v. *Porello*, 330 U. S. 446, as to the "forcing" of the award. If Northern Dock Company and/or the Travelers Insurance Company have taken advantage of the provisions of the Act, they were doing no more than this Court suggested an employer might do to protect itself against being impleaded as a third party when it said in *American Stevedores* v. *Porella*, *supra*, in referring to American Stevedores, Inc., the impleaded third-party employer (p. 455):

> "* * * American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation. In this way it could probably have forced an award and a consequent assignment of the right of action to itself."

If there is no fraud, if the Act does not provide for a trust relationship as to control of the suit and if whatever Northern Dock Company and Travelers Insurance Company did was in accordance with the Act, then there appears no special reason why a trust should be imposed in this case because of the fact that the Travelers covered both the Northern Dock Company and Hamilton Marine Contracting Company, Inc.

Even if the employer and carrier be deemed trustees, not only the trustee relationship must exist, but some breach thereof on the part of the trustees must also be shown before this suit may be prosecuted further. Identity of underwriters does not establish the breach. For example, if this personal injury case brought by petitioner lacks merit as a lawsuit, then The Travelers Insurance Company was justified in its decision not to prosecute further. If the injuries were trivial, as indeed the impartial compensation doctors found them to be, then The Travelers Insurance Company, as an economy measure, was justified in dropping not only its own claim for the $160.62 compensation, plus medical expenses paid, but any further claim that petitioner might have had in the way of a recovery over that amount.

This Court has no power or time to inquire into these facts. They must be accomplished in a proceeding wherein The Travelers Insurance Company and the Northern Dock Company are parties, and may meet the allegations of breach of trust or bad faith. Even if there were a trust relationship, petitioner has mistaken his remedy since relief if any against Northern Dock Company and The Travelers Insurance Company should be made the subject of a new and separate proceeding against those parties before the action for personal injuries be brought.

POINT VI

The question of laches.

Since it is the position of the respondents herein that there was a proper award and the consequent assignment of the cause of action to the petitioner's employer, petitioner could not, of course, be guilty of laches or delay in commencing the present suit since it was not his to begin. Only if the award is invalid is the question of laches reached. The petitioner is, of course, guilty of laches in not moving under Section 921 of Title 33 U. S. C. to set aside the award, or under Section 922 of Title 33 U. S. C. to modify the award if dissatisfied with the payments of compensation. The petitioner may also have been guilty of laches in making his point that the Northern Dock Company and/or The Travelers Insurance Company were to act as trustees in his behalf. This was not made until October 30, 1953. That issue, however, should be resolved in a proceeding brought against those parties for the relief asserted, and not in this action for personal injuries.

While petitioner cites a host of statutes he nowhere claims the Royal Norwegian government did not continuously maintain the consulate on which service was effected from the accident until the suit was started.

If the award is invalid, the issue of laches is to be determined properly by the lower Court with respect to the time limitation applicable to an action for personal injuries. If the award be valid, the issue of laches is moot.

CONCLUSION

The award is not now subject to review. In any event it was validly made and operated as an assignment of the cause of action to petitioner's employer. As such, the petitioner has no standing in this court. The petitioner has made a binding election to accept compensation. The trustee argument has no foundation under the Act, as drawn or under the facts in this case. Further, it should be asserted in another proceeding against the persons sought to be named as trustees. Given a valid award, laches is not in issue, except as to the timeliness of petitioner's asserting the trust relationship.

The case should be dismissed for lack of jurisdiction and on petitioner's election to accept compensation.

Dated, April 10, 1956.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Respondents
s/s Hoegh Silvercloud,
Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and Kerr Steamship Company, Inc.

FRANCIS X. BYRN,
on the brief.

APPENDIX

(In Evidence Before Judge Sugarman)

65-438

Carrier's No. B-5981165

September 25, 1945.

Mr. Blazey Czaplicki,
259 4th Street
Jersey City, N. J.

Re: Blazey Czaplicki
Northern Dock Co.
Inj. 9/6/45

Dear Sir:

Your employer's insurance carrier has advised this office that compensation payments are being withheld in your pending election to take compensation or to sue a third party.

If you intend to accept compensation, you should file a claim on the enclosed form U. S. 203 and a formal order will be issued. Section 33(b) of the Act provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

If, on the other hand you elect to sue the third party, you should file an Election to Sue on the enclosed form U. S. 213 in order to protect your future interests in the event that you should be unable to recover from the third party the amount that you would be entitled to under the Compensation Act.

Very truly yours,

D. B. O'KEEFE,
Claims Examiner.

DBO/ERC
Enc.

Copy to carrier.

H. R. 10119

84TH CONGRESS
2nd Session

IN THE

HOUSE OF REPRESENTATIVES

March 21, 1956

Mr. Zelenko introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act to provide that employees may recover damages from third parties despite the acceptance of compensation under this Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 14 (d) of the Longshoremen's and Harbor Workers' Compensation Act is amended by adding at the end thereof the following new sentence: "No employer may controvert the right to compensation on the ground that the person entitled to such compensation might have a right to recover damages against any third party for the injury or death of the employee."

SEC. 2. Section 33 of the Longshoremen's and Harbor Workers' Compensation Act is amended to read as follows:

"COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

"SEC. 33. Nothing in this Act shall prevent any person entitled to compensation under this Act from proceeding

against third parties for recovery of damages arising out of an injury, notwithstanding acceptance of compensation on account of such injury under an award in a compensation order filed by the deputy commissioner or the acceptance of compensation voluntarily paid by an employer, by the person entitled to such compensation. Acceptance of compensation under this Act shall not constitute an assignment of any cause of action of the employee against the third party."

SEC. 3. The amendments made by this Act shall not apply in the case of injuries or deaths occurring prior to the date of enactment of this Act.